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No. 73-746

In the Supreme Court of the United States

OCTOBER TERM, 1973

HONORABLE MORRIS E. LASKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The principal issue presented here is whether the court of appeals properly issued a writ of mandamus to compel the district court to reinstate an indictment it had erroneously dismissed under an incorrect interpretation of procedural rules promulgated by the court of appeals.

On February 25, 1970, a grand jury empanelled in the United States District Court for the Southern District of New York indicted seven persons for conspiracy to defraud the United States. The charge arose out of a kickback conspiracy between civilian buyers for European and American post exchanges and two representatives of American manufacturers, in violation

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of 18 U.S.C. 371. The indictments charged that Morton Penn and Fritz Claudius Mintz had made substantial payments to seven civilian buyer defendants from 1960–1967, in return for which the buyers caused the post exchange to buy products offered by Mintz's and Penn's clients. Each of the defendants pleaded not guilty except for defendant Mintz, who was a fugitive living in Europe. In April 1970, the defendants moved for dismissal of the indictments pursuant to Rule 48(b), Fed. R. Crim. P., on several grounds, including pre-indictment delay. No request for a trial date was made then, nor was one made thereafter. The motion to dismiss the indictments was denied on June 1, 1970.

On January 5, 1971, the Second Circuit Judicial Council promulgated the Rules Regarding Prompt Disposition of Criminal Cases (28 U.S.C.A. [U.S. Courts of Appeals Rules] Supp., p. 65); the effective date of these Rules was postponed until July 5, 1971. In general the Rules required that the government be prepared to go to trial within six months of the return of the indictment, or the indictment would be dismissed (Rule 4); they further stated, however, that periods of delay resulting from certain necessary actions, such as an attempt to apprehend a co-defendant, would not be included in that six months (Rule 5e).[1] During the period following the date of the indictment, the government had been attempting to find co-defendant Mintz and

[1] The Second Circuit Rules Regarding Prompt Disposition of Criminal cases were promulgated by the Second Circuit pursuant to 28 U.S.C. 332. These rules have since been superseded by the adoption of individual plans for each district pursuant to Rule 50(b), Fed. R. Crim. P.

bring him to trial. Since Mintz refused to return from Europe voluntarily, proceedings to extradite him from Spain were begun, with Judge Lasker's authorization, in June 1971. This effort proved unsuccessful.

On July 1, 1971, the United States Attorney caused these indictments to be listed, on the monthly case report of cases over six months old, as a Rule 5e exception under the Prompt Disposition Rules, due to Mintz's continuing fugitive status. On March 10, 1972, at the district court's insistence, the United States Attorney sent a letter to the defendants informing them of the reasons for the case being carried as a Rule 5(e) exception. Each defendant then moved to dismiss the indictment for delay pursuant to Rule 4 of the Prompt Dispositions Rules and Rule 48(b), Fed. R. Crim. P. The defendants charged that the government was not making a strong effort to find Mintz and that the government was seeking the delay for tactical reasons. The United States Attorney responded that a good faith effort—which he was prepared to document—was being made to locate Mintz, and that the delay had not benefited the government but rather had worked to its disadvantage. The government asserted further that it would proceed to trial at any time set by the court.

Six and a half months later, the district court granted the motion and dismissed the indictment. In a short opinion the district court held that Rule 4 of the Prompt Disposition Rules required dismissal and that the Rule 5 exception did not apply. The dis-

trict court specifically declined to rule on the claim under Rule 48(b), Fed. R. Crim. P. (Pet. App. CA1–CA8).

The United States appealed to the court of appeals from the order of dismissal and also sought a writ of mandamus directing the district court to reinstate the indictments. The court of appeals held that under former 18 U.S.C. 3731 (which applied to this case), an appeal by the United States did not lie;[2] however, it granted the mandamus petition and issued the writ (Pet. App. CA9–CA26).

1. The Court has sanctioned the use of mandamus in exceptional cases in which the issue concerns interpretations of procedural rules in cases of first impression. *Los Angeles Brush Mfg. Corp* v. *James,* 272 U.S. 701; *Schlagenhauf* v. *Holder,* 379 U.S. 104, 110; *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 257, 260. Here the court of appeals, under its supervisory power, granted a writ of mandamus to compel the district court to reinstate the indictments it had dismissed on the basis of a mistaken interpretation of the Speedy Trial Rules promulgated by the Judicial Council of the Second Circuit. Since this was a case of first impression involving a construction of those rules, it was clearly proper for the court of appeals to use mandamus to insure that the Speedy Trial Rules are correctly applied. Moreover, as the court of appeals pointed out (Pet. App. CA21–CA22), although the Speedy Trial Rules were superseded by district plans

[2] Under the current version of 18 U.S.C. 3731 as amended by 84 Stat. 1890, which is applicable to criminal cases commenced after January 1971, a dismissal such as that in the instant case would be appealable.

subsequently adopted for the same purpose, the relevant portions of the new plans continue substantially unchanged the provisions of the Speedy Trial Rules which it was interpreting. Erroneous interpretation of those provisions by the district court could therefore lead to substantial disruption of the criminal justice system within the circuit until another case could be brought before the court of appeals. As the court of appeals correctly pointed out "[i]t is the business of this court to prevent such potential disruption of the orderly administration of criminal justice in this circuit whenever it can; indeed, the very rules involved here were promulgated with that end in mind" (Pet. App. CA22).

Contrary to petitioner's claim, the grant of the writ of mandamus in the instant case was not inconsistent with this Court's decision in *Will* v. *United States*, 389 U.S. 90. Unlike this case, the mandamus relief requested in *Will* was from an interlocutory decision of the district court concerning the scope of discovery.[3] Moreover, the Court there found that the gov-

[3] The court in *Will* emphasized that it was not ruling out the remedy of mandamus in cases such as this (389 U.S. at 97–98):

> This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, *Ex parte United States*, 242 U.S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.

ernment's factual premises were not supported by the record (*id.* at 100) and noted that the court of appeals granted mandamus without a reasoned exposition of the basis of its actions (*id.* at 107). Here, on the other hand, the factual premises with respect to the need for mandamus relief are supported by the record. The factual and legal analysis of the proper standards for implementing both the Rules and the successor Plans in the comprehensive opinion of the court of appeals are ample for the "vital corrective and didactic function" (*ibid.*) which the writ was intended to serve.

2. Petitioner's contention that there is a conflict among the courts of appeals on this issue is without substance. The cases he cites merely involved claims that the district court had abused its discretion.[4] They did not involve "the enforcement of the * * * [r]ules which by law it is the duty of this Court [or the Judicial Council] to formulate and put in force," in which instance mandamus is necessary to prevent action by the district court "so palpably im-

[4] In *United States* v. *Hester*, 325 F. 2d 654 (C.A. 9), cited by petitioner (Pet. 15), the court of appeals declined to issue the writ of mandamus after finding that "[i]n the light of all the factors considered by the trial court [judge]"—who ordered the case set for trial on a particular day and dismissed the indictment for failure to prosecute—"we cannot agree that there was the clear abuse of discretion" (325 F. 2d at 657). In *Thornton* v. *Corcoran*, 407 F. 2d 695 (C.A.D.C.), the court refused mandamus to compel a hospital to allow the defendant's attorney to sit in on a staff meeting involving a pre-indictment mental examination. In *Johnston* v. *Marsh*, 227 F. 2d 528 (C.A. 3), the court of appeals denied mandamus to force a district court to revoke the bail of a state prisoner.

proper as to place it beyond the scope of the rule invoked." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256. Where, however, remedial action of the kind sought in this case is necessary, there is substantial support for the view that mandamus is appropriate. See *United States* v. *Real*, 446 F. 2d 40 (C.A. 9); *United States* v. *Gray*, 448 F. 2d 164 (C.A. 9); *Hilbert* v. *Dooling*, 476 F. 2d 355 (C.A. 2), certiorari denied, October 9, 1973 (No. 72-1653); see also *United States Board of Parole* v. *Merhige*, 487 F. 2d 25 (C.A. 4).

Petitioner's related claim that there is a conflict within the Second Circuit ignores the distinction between cases in which mandamus was granted to enforce compliance with procedural rules (*Hilbert* v. *Dooling, supra; United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917) and cases in which it was denied where all that was alleged was an abuse of discretion. *United States* v. *DiStefano*, 464 F. 2d 845 (C.A. 2); *Securities and Exchange Commission* v. *Stewart*, 476 F. 2d 755 (C.A. 2); *United States* v. *Griesa*, 481 F. 2d 276 (C.A. 2). In any event, if there is some inconsistency in the various Second Circuit decisions, that inconsistency should be resolved by that court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.[5]

4. Petitioner's final contentions concerning the proper interpertation of the Speedy Trial Rules and the standards for dismissal under Rule 48(b) were fully

[5] Significantly, no judge in active service in the court of appeals asked for a vote on the petition for rehearing *en banc* below (Pet. App. C.A. 28).

discussed and properly rejected by the court of appeals, on whose opinion we rely in this respect. The related claim (Pet. 18) that the court of appeals should not have reached the issue whether a dismissal was mandated under Rule 48(b) ignores the fact that this issue was reached in response to petitioner's alternative claim that "the writ should not issue here because the dismissal was proper * * * on the motion to dismiss under Rule 48(b) of the Federal Rules of Criminal Procedure." The court of appeals, however, correctly held that "since * * * the Rule 48(b) motion should have been denied, this is no obstacle to mandamus" (Pet. App. CA23–CA24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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